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Unfair Trade Practices- Robinson-Patman Act - "Per Se" Nature of Section 2(e)

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UNFAIR TRADE PRACTICES—ROBINSON-PATMAN ACT—"PER SE" NATURE OF SECTION 2 (e)—The Federal Trade Commission, finding that a manufacturer and seller of dress patterns discriminated between competing purchasers in violation of section 2 (e) of the Clayton Act, as amended by the Robinson-Patman Act,[1] by paying transportation costs and donating storage cabinets and monthly catalogues to its large variety store customers while charging its smaller fabric store customers for the same services and facilities, issued a cease and desist order against these practices. The commission held that neither the absence of competitive injury nor the presence of cost justification are available as defenses to section 2 (e).[2] On petition for re-

[1] Section 2 (e) reads: "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." 49 Stat. 1526 (1936), 15 U.S.C. (1958) §13 (e).

[2] These defenses were undoubtedly suggested by §2 (a) of the Robinson-Patman Act which reads in part: "That it shall be unlawful for any person engaged in commerce, . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce,

view, the court of appeals remanded the case to allow the defendant to submit a defense of cost justification.[3] On certiorari to the United States Supreme Court, *held,* reversed in part. Neither absence of competitive injury nor the presence of cost justification constitute a defense to a prima-facie violation of section 2 (e).[4] *Federal Trade Commission v. Simplicity Pattern Co.,* 360 U.S. 55 (1959).

By this decision the Court has committed itself to hold virtually every prima-facie violation of section 2 (e) illegal "per se."[5] The decision is in accord with the previous holdings and dicta of lower courts that section 2 (e) violations were not subject to the defenses of cost justification[6] or absence of competitive injury.[7] The lower court in the principal case sought to avoid these prior decisions by arguing that the main clause of section 2 (b), which places the burden of justification on a prima-facie section 2 (e) violator, would be meaningless if the violator could not use cost justification as a defense.[8] Although the legislative history of section 2 (b)

or to injure, destroy, or prevent competition with any person. . . . *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ." 49 Stat. 1526 (1936), 15 U.S.C. (1958) §13 (a).

[3] Simplicity Pattern Co. v. FTC, (D.C. Cir. 1958) 258 F. (2d) 673, cert. granted 358 U.S. 897 (1958); comments, 68 YALE L. REV. 808 (1959), 26 UNIV. CHI. L. REV. 128 (1958); notes, 28 FORD. L. REV. 144 (1959), 72 HARV. L. REV. 385 (1958), 42 MARQ. L. REV. 262 (1958).

[4] In all probability §2 (d) of the Robinson-Patman Act, which prohibits sellers from making discriminatory payments to competing purchasers for services or facilities furnished by the latter, will receive the same interpretation as §2 (e), since past cases have interpreted them in the same light although their language differs somewhat. See, e.g., Elizabeth Arden Sales Corp. v. Gus Blass Co., (8th Cir. 1945) 150 F. (2d) 988; United Cigar-Whelan Stores Corp. v. H. Weinreich Co., (S.D. N.Y. 1952) 107 F. Supp. 89.

[5] "Per se" violations, in antitrust cases, are those practices which the courts conclusively presume are illegal or unreasonable, *sans* defenses. For a recent case discussing the unreasonable "per se" doctrine under the antitrust laws, see Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); note, 57 MICH. L. REV. 1244 (1959). The only defense that remains is found in the proviso of §2 (b) which states: "That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that . . . the furnishing of services or facilities . . . was made in good faith to meet . . . the services or facilities furnished by a competitor." 49 Stat. 1526 (1936), 15 U.S.C. (1958) §13 (b).

[6] Great Atlantic & Pacific Tea Co. v. FTC, (3d Cir. 1939) 106 F. (2d) 667. This was a §2 (c) case with dicta that cost justification could not be a defense to §2 (e).

[7] Southgate Brokerage Co. v. FTC, (4th Cir. 1945) 150 F. (2d) 607 (dictum as to competitive injury); Oliver Bros., Inc. v. FTC, (4th Cir. 1939) 102 F. (2d) 763 (dictum as to competitive injury); Elizabeth Arden, Inc. v. FTC, (2d Cir. 1946) 156 F. (2d) 132; Corn Products Refining Co. v. FTC, (7th Cir. 1944) 144 F. (2d) 211, affd. on other grounds 324 U.S. 726 (1945). In the two cases which squarely hold that competitive injury need not be shown in a §2 (e) violation, the courts did not discuss the legislative history of the section, assuming that §2 (e) was meant to be unqualified since §2 (a) justifications were not specifically set out in §2 (e).

[8] Simplicity Pattern Co. v. FTC, note 3 supra, at 679. The main clause of §2 (b) reads: "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in . . . *services or facilities furnished,* the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged." 49 Stat. 1526 (1936), 15 U.S.C. (1958) §13 (b). Emphasis added.

is sparse, the Supreme Court seems correct in rejecting this argument on the ground that section 2(b) was intended to be procedural, having no substantive content.[9] But by annexing to their holding a footnote stating that the competitive injury and cost-differential defenses found in section 2(a) cannot be read directly into section 2(e),[10] the Court apparently disregards its earlier pronouncement that it has a "duty to reconcile [interpretations of the Robinson-Patman Act], except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress."[11] The Court did not cite any convincing legislative history showing congressional intent that section 2(e) was to be interpreted as a "per se" statute;[12] indeed there is some evidence that the sponsors of the Robinson-Patman Act intended that all the sections be construed in harmony with section 2(a)[13] which prohibits direct or indirect price discrimination only where the effect may injure competition or cannot be cost justified. The main purpose of section 2(e) was to stop sellers from indirect price discrimination through discriminatory furnishing of advertising services.[14] But the principal case precludes any argument that section 2(e) is a specific instance of the "indirect" price discriminations prohibited by section 2(a) and therefore that section 2(a) justifications should be available as section 2(e) defenses[15] in order to effectuate basic antitrust philoso-

[9] This section was referred to during debates as a "procedural" or "burden of proof" provision. See, e.g., 80 CONG. REC. 8110, 8231, 9414, 9418 (1936). Cf. Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953). For like interpretations of §2(b), see AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT, rev. ed., 83 (1959); comment, 68 YALE L. REV. 808 (1959).

[10] Principal case at 71, note 18.

[11] Automatic Canteen Co. v. FTC, note 9 supra, at 74 (holding that a prima-facie case was not established under §2(f) of the Robinson-Patman Act until proved that the buyer was aware that the price concession he was receiving was an illegal discrimination).

[12] For arguments that §2(e) should not be interpreted as a "per se" section, see REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 191 (1955); AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT, rev. ed., 122 (1959); Oppenheim, "Should the Robinson-Patman Act be Amended?" CCH ROBINSON-PATMAN ACT SYMPOSIUM 145 (1948).

[13] "There is nothing in it to penalize, shackle, or discourage efficiency, or to reward inefficiency. . . . [None of the] physical economies that are to be found in mass buying and distribution . . . are in the remotest degree disturbed by this bill. . . . It is the design and intent of this bill to strengthen existing antitrust laws, prevent unfair-price discriminations, and preserve competition in interstate commerce." H. Rep. 2287, 74th Cong., 2d sess., p. 17 (1936).

[14] See 80 CONG. REC. 7759 (1936), where Mr. Patman said, "Large manufacturers have been coerced into giving certain large mass buyers great reductions in prices under the guise of advertising allowances. This bill will not prohibit advertising allowances but it will prohibit advertising allowances to be used as a guise for price reductions. . . ." See also, H. Rep. 2287, 74th Cong., 2d sess., pp. 15-16 (1936); H. Rep. 2966, 84th Cong., 2d sess., p. 97 (1956); 80 CONG. REC. 3114, 6282 (1936).

[15] For authorities advocating this interpretation of §2(e), see, generally, Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 MICH. L. REV. 1139 at 1206-1207 (1952); Rowe, "How To Comply with Sections 2(c)-(f)," CCH 1957 ANTITRUST LAW SYMPOSIUM; REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 191-193 (1955).

phy of maintaining but not sterilizing competition.[16] Since the economic effects of direct price discrimination and indirect price discrimination (through the furnishing of services or facilities) are basically the same, it seems that they should be treated alike where Congress has not clearly indicated differential treatment.[17]

As a result of the principal case the only avenue left for using a standard of reasonableness, rather than a "per se" approach, in applying section 2 (e) is to follow the Court's suggestion that the commission has recognized that the services rendered need not be exactly the same for every customer to be on "proportionally equal terms" within the meaning of section 2 (e).[18] If the Federal Trade Commission and the courts will take a liberal view of what are "proportionally equal terms," perhaps some amount of cost justification could be brought into the determination of section 2 (e) violations.[19] However, following this decision that section 2 (e) discriminations cannot be justified by lack of competitive injury or cost differentials, it seems improbable that the commission and courts will interpret the "proportionally equal terms" clause as a means of reconciling section 2 (e) with the interpretation of section 2 (a). Hence a legislative amendment to the Robinson-Patman Act seems to be the only solution left to effectuate such a reconciliation.

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[16] "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' . . . Congress did not seek by the Robinson-Patman Act . . . to abolish competition. . . ." Standard Oil Co. v. FTC, 340 U.S. 231 at 248-249 (1951) (holding that meeting competition is a defense to §2 (a) although competition is injured).

[17] In the past the courts and the commission have not hesitated in reading §2 (a) phrases into §§2 (e) or 2 (d). See, e.g., Elizabeth Arden, Inc. v. FTC, note 7 supra ["engaged in commerce" and "in the course of such commerce" read into §2 (e)]; Golf Ball Mfgrs. Assn., 26 F.T.C. 824 (1938) and Atlanta Trading Corp. v. FTC, (2d Cir. 1958) 258 F. (2d) 365 [commodities of "like grade and quality" read into §2 (d)].

[18] Principal case at 61, note 4. Apart from services and facilities furnished only to variety stores, Simplicity also furnished some services and facilities to the fabric stores which the variety stores did not make use of, although they were available to them. The Court intimated this might have constituted "proportionally equal terms," but since it had not been argued that Simplicity was thereby treating its customers on "proportionally equal terms" the Court did not pass on the question.

[19] The FTC has indicated it would take a broad view of proportional equality in Lever Brothers Co., 50 F.T.C. 494 (1953), where in regard to §2 (d) it said a "plan providing payment for promotional services and facilities . . . must be honest in its purpose and fair and reasonable in its application." See also Colgate-Palmolive-Peet Co., 50 F.T.C. 525 (1953); Procter & Gamble Distributing Co., 50 F.T.C. 513 (1953); Cosmetic and Toilet Preparations Industry Rules, 3 CCH TRADE REG. REP. ¶20,221 (1954). On the difficulties of the clause "proportionally equal terms," see, generally, AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT, rev. ed., 146 (1959); Layton, "Demonstrators on Proportionally Equal Terms," CCH ROBINSON-PATMAN ACT SYMPOSIUM 38 (1948).